

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CESAR F.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2010120446

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 10, 2011, in Culver City.

Cesar F. (claimant) was not present; he was represented by his mother, Diana O.¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received. The record was held open to allow claimant to file and serve additional diagnostic documentation by May 24, 2011, and to allow the Service Agency to file and serve a response by June 7, 2011. Claimant timely filed and served the additional documentation, which was marked as Exhibit H and admitted into evidence. The Service Agency timely filed and served a response, which was marked as Exhibit 13 and admitted into evidence.

The record was subsequently reopened to allow claimant to file and serve additional diagnostic documentation by August 12, 2011, and to allow the Service Agency to file and serve a response by August 26, 2011. Claimant timely filed and served additional documents, which were collectively marked as Exhibit I and admitted into evidence. The Service Agency timely filed and served a response, which was marked as Exhibit 14 and admitted into evidence.

The record was closed and the matter was submitted for decision on August 26, 2011.

¹ Initials and family titles are used to protect the privacy of claimant and his family.

ISSUE

IS CLAIMANT ELIGIBLE FOR REGIONAL CENTER SERVICES UNDER THE LANTERMAN DEVELOPMENTAL DISABILITIES SERVICES ACT (LANTERMAN ACT)?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a thirteen-year-old boy.
2. Claimant's mother initially asked the Service Agency to determine claimant's eligibility for services in 2008. By letter dated November 18, 2008, the Service Agency notified claimant's mother that it had determined that claimant is not eligible for regional center services because he does not meet the criteria set forth in the Lanterman Act.
3. In the summer of 2010, claimant's mother submitted additional information and asked the Service Agency to reconsider its denial of eligibility. By letter dated September 29, 2010, the Service Agency notified claimant's mother that it had again determined that claimant is not eligible for regional center services.
4. On or about October 28, 2010, claimant's mother filed a fair hearing request to appeal the Service Agency's determination regarding eligibility, writing that claimant "has been unequivocally diagnosed with autistic disorder" (Ex. 2.)

Claimant's Background

5. Claimant lives at home with his mother and two teenaged sisters. He is cared for by his maternal grandmother while his mother works.
6. Claimant currently receives special education services, speech therapy, adapted physical education, and counseling at Prairie Vista public school.
7. A psychosocial assessment report dated June 26, 2008, prepared by Florence M. Garcia, an intake coordinator for the Service Agency, states that claimant's mother had numerous concerns about claimant's lack of academic and social success in school and about his behavior, including his tantrums. Claimant's mother also reported that claimant had been delayed in achieving various developmental milestones through the age of four, particularly with respect to language. There was a history of domestic violence in claimant's family, which claimant had witnessed and as a result of which claimant was receiving counseling services. The report reflects the findings of a school assessment, which found a considerable discrepancy between claimant's "superior cognitive abilities" and his academic achievement. In March 2008, an evaluator at the Children's Institute, Inc., recommended that claimant be evaluated at a regional center. In her assessment report, Ms. Garcia recommended that

claimant be scheduled for a psychological assessment at WRC and that an interdisciplinary team review claimant's eligibility. (Ex. 9.)

8. Ann L. Walker, Ph.D., a clinical psychologist consulting for the Service Agency, performed a psychological evaluation of claimant. Dr. Walker met with claimant and claimant's mother on August 15, 2008, and October 28, 2008. Dr. Walker reported administering the following tests: Wechsler Intelligence Scale for Children—4th Edition (WISC-IV); Wide Range Achievement Test—4th Revision (WRAT-4); Vineland Adaptive Behavior Scales, 2nd Edition (Vineland-II); Autism Diagnostic Interview—Revised (ADI-R); and the Autism Diagnostic Observational Schedule, Module 3 (ADOS). (Ex. 8.) She also conducted a clinical interview and reviewed records.

9. Dr. Walker reported that claimant's mother said claimant had not developed peer relationships appropriate to his developmental level, but that claimant described several reciprocal friendships, though he recently changed schools and felt lonely. During the second interview, Dr. Walker administered the ADOS and observed claimant for about 20 minutes of free play with his two older sisters, noting that claimant's play "was very immature, but creative and well organized." She reported that claimant engaged in spontaneous conversation with her, that he was able to talk about his feelings and about being teased in school, and that he "initiated joint attention frequently coordinating eye contact with words and gestures. He showed no stereotypic use of words."

10. Dr. Walker's report of her observations is, in at least one particular, repeatedly self-contradictory. She wrote that claimant "did not make eye contact with the examiner during the evaluation. He avoided eye contact." (Ex. 8, p. 3.) On the next page, she wrote that "[claimant's] mother reports that he usually avoids eye contact, which was not observed during the evaluation. [Claimant] sustained good eye contact on both testing dates." (*Id.*, p. 4.) One page later, reporting on her administration of the ADOS, she wrote that "[claimant] avoided eye contact with the examiner as she tried to engage him in play," but that he did maintain eye contact while describing a picture and relating a story from a book in the ADOS kit. (*Id.*, pp. 5-6.) She then reported that "[claimant] sustained eye contact throughout the administration of the ADOS" and "[claimant] sustained good eye contact on both testing dates." (*Id.*, p. 7.)

11. Dr. Walker concluded in her report:

[Claimant] . . . does not meet diagnostic criteria for the diagnosis of Autistic Disorder. [He] tested in the autistic range on the ADI-R in restricted and stereotyped interests and in the non-autistic range on the ADOS and ADI-R in communication and reciprocal social interaction skills.

[Claimant] shows the following behavior *inconsistent* with the diagnosis of Autistic Disorder. He sustains eye contact. He shares interest and achievement. He shows emotional reciprocity. [Claimant] engaged in several reciprocal

conversations with the examiner. [Claimant] described developing peer relationships appropriate to his developmental age and described several long friendships and described reciprocal friendships. His play is immature, but he is capable of imitative and imaginary play, which was observed. [Claimant] shows no preoccupation with parts of objects.

The diagnosis of Pervasive Developmental Disorder NOS is recommended since [claimant] showed delays in language development when he was younger, and continues to show immature social skills development. In addition, [claimant] shows a repetitive motor mannerism of rocking. He shows restricted areas of interest. He is interested in limited activities such as video games and building origami figures. He is upset by any change in routine. (Ex. 5.)²

(Ex. 8; italics in original.) Dr. Walker further concluded that, despite performing at normal or above average intelligence levels on her tests, claimant’s academic skills were significantly below his grade level, his “communication skills were in the borderline range and he showed significant delays in self-help and social skills, which were significantly delayed in the mild range.” She recommended that claimant receive supports at school, including behavioral therapy, and that he also receive behavioral therapy at home to improve compliance and to reduce tantruming.

12. Dr. Walker obtained the following ADOS results for Claimant:

<i>Communication Total</i>	0
<i>(autism cut-off: 3; autism spectrum cut-off: 2)</i>	
<i>Social Interaction Total</i>	1
<i>(autism cut-off: 6; autism spectrum cut-off: 4)</i>	
<i>Communication plus Social Interaction Total</i>	1
<i>(autism cut-off: 10; autism spectrum cut-off: 7)</i>	

13. Dr. Walker obtained the following ADI-R results:

Abnormalities in Reciprocal Social Interaction	6
(Autism cut-off: 10)	

² The report’s signature line is dated August 15, 2008, but the report contains a record of observations made on October 28 as well as on August 15, 2008.

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Abnormalities in Communication 4

(Autism cut-off: 8)

Restricted and Stereotypic Patterns of Interest 8

(Autism cut-off: 3)

14. WISC-IV scores obtained by Dr. Walker showed that claimant's cognitive intellectual skills were in the normal range. WRAT-4 scores showed that claimant, who at the time was about to enter the fifth grade, had math skills four grade levels below his present grade, spelling skills three grade levels below, and reading skills two grade levels below. Vineland-II scores showed borderline communication skills and significantly delayed self-help skills and social skills. (Ex. 8.)

15. After the Service Agency's November 2008 denial letter, claimant's mother informed the Service Agency that she believed that Dr. Walker's assessment was not comprehensive because Dr. Walker had not observed claimant at school.

16. In response, Thompson Kelly, Ph.D., chief psychologist at WRC, observed claimant at school. In his Psychological Consultation report dated January 14, 2009, Dr. Kelly wrote that "[a]lthough this examiner would agree that [claimant] displays deficits in some areas, observation of him in an academic and social setting did not reveal extensive or severe deficits in socialization and communication or mannerisms and behaviors that would be sufficient to warrant a formal diagnosis of an Autistic Disorder." (Ex. 7.) Dr. Kelly found that claimant exhibited good joint attention, made good eye contact with teachers and peers, participated in appropriate interactions, did not display stereotyped or repetitive verbal or motor mannerisms, used an appropriate range of nonverbal expressions and gestures, and displayed shared enjoyment during free time activities. Dr. Kelly wrote that

this examiner would not conclude that [claimant] was a child with autism. In addition [claimant's] behavior was not wholly suggestive even of an autism spectrum diagnosis. Rather it was this examiner's impression that a diagnosis of an Attention Deficit Hyperactivity Disorder, Primarily Inattentive Type should be ruled out in a mental health setting and also that a diagnosis of a Learning Disorder be explored with the school district.

(*Id.*)

17. On July 22, 2010, Cindy LaCost, Psy.D., a PEDS Fellow working at the Reiss-Davis Child Study Center (Reiss-Davis) under the supervision of Leslie Fulgham, Ph.D., a licensed clinical psychologist, prepared a psychological evaluation report after two meetings

with claimant's mother and 10 sessions with claimant between February 4, 2010, and July 22, 2010. (Ex. 5.) Dr. LaCost reported administering the following tests: WISC-IV; Vineland-II; Gilliam Autism Rating Scale—Second Edition (GARS 2), and various educational achievement, perceptual processing, behavior rating, neuropsychological, sensor, and psychological instruments. She also conducted a records review. Dr. LaCost diagnosed claimant with autistic disorder; dysthymic disorder, early onset, atypical features; specific phobia, animal (insects), natural environment (water) and other (germs) types; reading disorder; disorder of written expression; mathematics disorder; and disruptive behavior disorder NOS.

18. Dr. LaCost noted that claimant's mother reported that claimant experienced early speech delays and other developmental delays, engages in limited eye contact, prefers not to be touched, separates his food, fears water and requires his mother to bathe him, wears only shorts and tee shirts that feel a certain way, has no friends, has age-inappropriate interests, tantrums, has difficulty with transitions and changes in routine, and is frequently removed from class due to disruptive behavior and making repetitive animal noises. (Ex. 5.)

19. Claimant's mother submitted Dr. LaCost's report to the Service Agency. (See Factual Finding 3.) The Service Agency reviewed the report and concluded that "the current record provided was not supportive of a diagnosis of Autistic Disorder" but appeared consistent with a mental health condition solely and not in combination with a developmental condition. At hearing, Dr. Thompson testified that Dr. LaCost's report lacked sufficient observational information, such as would be reflected in the administration of the ADOS and a visit to claimant's school, to support a diagnosis of autism.

20. On May 13, 2011, claimant's mother submitted a Diagnostic Evaluation report from Reiss-Davis, reflecting the results of evaluations performed on January 28, February 4, and March 10, 2011. Testing included administration of the ADOS-3, the ADI-R, and the Vineland Adaptive Behavior Scales—Second Edition.³

21. The ADOS was administered by Amanda Wall, Psy.D., under the supervision of Allison Kawa, Psy.D., a licensed psychologist. Dr. Wall obtained the following ADOS results for claimant:

<i>Communication Total</i>	3
<i>(autism cut-off: 3; autism spectrum cut-off: 2)</i>	
<i>Social Interaction Total</i>	7
<i>(autism cut-off: 6; autism spectrum cut-off: 4)</i>	

³ The Service Agency noted that "[t]he examiners have not provided any scores from the [ADOS] that support their findings of autistic disorder." (Ex. 13.) Claimant's mother subsequently caused the ADOS and ADI-R scores to be submitted. (Ex. I.)

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Communication plus Social Interaction Total 10

(autism cut-off: 10; autism spectrum cut-off: 7)

22. The ADI-R was administered by Amy DiNoble, Ph.D., under the supervision of Dr. Kawa. Dr. DiNoble obtained the following ADI-R results for claimant:

Abnormalities in Reciprocal Social Interaction 28

(Autism cut-off: 10)

Abnormalities in Communication 21

(Autism cut-off: 8)

Restricted and Stereotypic Patterns of Interest 10

(Autism cut-off: 3)

23. The Diagnostic Evaluation report diagnosed claimant with autism, referencing claimant's developmental history and the testing results in the context of the criteria listed in the Diagnostic and Statistical Manual IV (DSM-IV). (Exs. H, I.)

24. After reviewing the Diagnostic Evaluation report, the Service Agency concluded that "the diagnosis of autistic disorder is not supported by the Reiss-Davis evaluation," and that the testing results "are more consistent with a mental health condition and learning disabilities" (Ex. 13.) The Service Agency also criticized those results on the grounds that the ADOS was administered by a post-doctoral fellow who lacked certification in administering that instrument. After receiving the test scores and the curriculum vitae of Drs. Kawa, Wall, and DiNoble, the Service Agency noted that among them only Dr. Kawa was certified to administer the ADOS. The Service Agency also noted that the ADOS scores are not significantly above the autism cutoffs and therefore "do not reflect the severity one would expect to see for an individual with autistic disorder." (Ex. 14.)

25. Dr. Kawa wrote, in a letter dated August 6, 2011 (Ex. I), that Drs. Wall and DiNoble had received:

extensive training via lectures and videotaped practice in the administration and scoring of the [ADOS] and the [ADI-R]. Training occurs weekly for several months

Clinical supervision for evaluations of our clients is thorough and intensive. Fellows administer the ADI-R with the parent and bring the completed protocols to a group supervision meeting. Each item scoring . . . is reviewed during supervision. Final

ADI-R codes represent the consensus of the fellows and myself. Each ADOS is administered with me present in the room In this way, I can participate in the ADOS as needed to ensure appropriate administration. Following each ADOS, I meet with the fellows and we code the items together.

26. Claimant's mother testified that claimant engages in repetitive rocking, bites his knuckles until they bleed, shouts the same thing for hours, makes disruptive animal sounds, rarely makes eye contact, will not let anyone touch him, dislikes loud noises, fears water and requires his mother to bathe him, and isolates himself in his room. She testified that his new school has been difficult for claimant, because the other children in his class have emotional disturbances.

27. The weight of the evidence establishes that claimant has autistic disorder, that autism has constituted a substantial disability for claimant since before he was 18 years old, and that the condition will continue indefinitely. The recent assessments performed at Reiss-Davis, with the active participation and close supervision of Dr. Kawa, are more persuasive than the record reviews and evaluations performed on behalf of the Service Agency, especially in light of the testing results that showed claimant reaching the autism cutoffs in every area in both the ADOS and the ADI-R and in light of Reiss-Davis's application of the DSM-IV criteria. Dr. Walker's evaluation is internally inconsistent and at great variance with the Reiss-Davis results. Dr. Kelly's observation of claimant at school was informative and useful but did not effectively rule out autistic disorder.

LEGAL CONCLUSIONS

1. Cause exists to grant claimant's request for regional center services, as set forth in Factual Findings 1 through 26, and Legal Conclusions 2 through 4.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for government benefits or services. (See Evid. Code, § 115.)

3. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, claimant must show that he suffers from a developmental disability that "originate[d] before [he] attain[ed] 18 years old, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for [him]." (Welf. & Inst. Code, § 4512, subd. (a).) "Developmental disability" is defined to include mental retardation, cerebral palsy, epilepsy, autism, and "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (*Id.*)

4. Claimant established by a preponderance of the evidence that he is eligible for regional center services under the Lanterman Act, with a qualifying diagnosis of autism. (Factual Findings 5 through 26.)

ORDER

Claimant Cesar F.'s appeal is granted; Westside Regional Center's decision denying claimant's request for regional center services is reversed.

DATE: October 25, 2011

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.